UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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E. JEAN CARROLL,

Plaintiff,

v. 20 CV 7311 (LAK)
Telephone Conference

DONALD J. TRUMP, in his personal capacity,

Defendant.

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New York, N.Y.
December 11, 2020
9:30 a.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge

APPEARANCES

KAPLAN HECKER & FINK LLP
Attorneys for Plaintiff
BY: ROBERTA ANN KAPLAN
JOSHUA ADAM MATZ
MARCELLA COBURN

KASOWITZ BENSON TORRES & FRIEDMAN LLP
Attorneys for Defendant
BY: CHRISTINE A. MONTENEGRO
PAUL J. BURGO

(The Court and all parties appearing telephonically)

THE COURT: Good morning. This is Judge Kaplan.

Am I audible, Andy?

THE DEPUTY CLERK: Yes, Judge, you are audible. And you were probably listening while I just took attendance. I believe everyone is on the line.

THE COURT: Good.

All right. Let me hear from the parties about where we are.

Ms. Kaplan?

MS. KAPLAN: Your Honor, my partner, Mr. Matz, is going to address most of the argument this morning.

So go ahead, Mr. Matz.

MR. MATZ: Good morning, your Honor. This is Joshua Matz, of Kaplan Hecker & Fink, for plaintiff, Ms. Carroll.

Where we are, your Honor, I suppose, is a little bit confounded by the fact that Mr. Trump's private counsel waited until 7:58 p.m. last night to file a motion to stay the case and to adjourn this proceeding. Obviously, the request for an adjournment is now moot.

So if it would be helpful, what I would respectfully suggest is that I briefly describe how we came to that point, including some of our interactions with Mr. Trump's counsel, and then indicate that we do oppose that motion to stay and perhaps offer some thoughts on that in service of a request for

us to have the opportunity to submit briefing on it at some point next week.

Thank you very much.

So, to start out with some basics here, it's a bit much to hear Mr. Trump's lawyers say that it would be unfair for him to have to proceed with this case when he has bent and broken virtually every rule to avoid doing so and has already attempted to abuse the Justice Department in pursuit of that personal errand.

For someone who has so emphatically denied sexually assaulting Ms. Carroll and has so brazenly slandered her for daring to speak up, Mr. Trump sure seems desperate to avoid the justice system. That aspiration is a sign of weakness and fear. In fact, Mr. Trump is so desperate, that his counsel here have undertaken the kind of gamesmanship that gives the rest of us lawyers a bad name, and, as I'll emphasize in just a minute, that conduct is relevant to the question that Mr. Trump's lawyers have now put before the Court, namely, whether Mr. Trump is entitled to a stay of the proceedings while he pursues an appeal in the Second Circuit. But, of course, to get to that point, I think it's very helpful to understand how that motion came to be filed at 7:58 p.m. last night.

And in argue, having now lived with this case and litigated it for over a year, that is just the latest chapter

in a story that goes back to when we first filed the case. When we filed it in November of 2019, the President and his lawyers refused to accept service of the complaint, gratuitously complicating what should have been a straightforward process. They then used every stall tactic in the book. They filed a motion to dismiss based on the spurious assertion that Mr. Trump wasn't even subject to personal jurisdiction as a resident of New York. Six days after we served discovery requests, they sought a stay in light of *Zervos v. Trump*, a case pending in the state court, even though they had already argued that that case was so different, that it couldn't even be considered related.

Then, when those efforts failed, and the stay was lifted, they refused to produce any documents in response to Ms. Carroll's second set of document requests, while still somehow managing -- despite their insistence now that discovery cannot proceed, they still somehow managed in state court, while not responding to our document requests, to serve requests for document production and interrogatories on Ms. Carroll. And, of course, in that period — and this is really August and September of 2020 — they consistently communicated to us, the lawyers that are on the line right now communicated to us, their intent to litigate the case in state court, including their intent to seek an appeal as of right from the denial of their motion to stay the proceedings.

But, as we all know, on the very last possible day for them to take that appeal, it turned out that their client has been working behind the scenes to arrange for a direction to be issued to the Justice Department to seek removal of the case to federal court on the improbable grounds that President Trump was acting within the scope of his office and employment at the time he slandered Ms. Carroll.

Of course, even then, it seems like the gamesmanship continued. The Justice Department, acting as President Trump's counsel, attempted to reschedule the argument on the day it was supposed to happen, and then refused to argue the case by phone, and then waived most of their case, reciting all of the arguments in their reply brief, rather than allow Ms. Carroll an opportunity to present any argument or even to respond to all those newly-raised contentions.

Now, after this Court ultimately rejected the Justice Department's motion to substitute defendant, on November 11th, this Court issued an order rescheduling the initial pretrial conference. To ensure that there was not any confusion, I personally served that order by email and sent hard copy versions of that order to the Kasowitz firm along with a proposed scheduling order, but I did not receive any response to that email.

On November 20th, this Court issued a follow-up order indicating that in light of its ruling on the Justice

Department's motion to substitute, that Mr. Trump's state court present counsel, which is to say the Kasowitz firm, would continue to represent President Trump here and should appear on the docket. That same day, I served the Court's order on Mr. Kasowitz and his colleagues and requested the favor of a response to my earlier email by no later than November 24th, 2020. And although Mr. Trump's private lawyers later filed a notice of appeal, they never actually responded to our proposed schedule until Wednesday of this week.

Now, in the interim, on Tuesday of this week, December 8th, your Honor's courtroom deputy contacted counsel regarding the logistics for the conference. On Wednesday, at 2:00 p.m., Mr. Burgo, of the Kasowitz firm, responded in an email in which he requested adjournment of this conference and indicated that it was his decision that the Court should stay proceedings, and, in that email, he cited essentially all of the cases that its argument relies upon, so we know that they have formed the opinion that a stay was warranted and had apparently concluded all or most of their legal research on that by Wednesday at 2:00 p.m. Thirty minutes after Mr. Burgo sent that email, your Honor's courtroom deputy responded to say that this request, and I quote, "needs to be promptly filed as a motion on ECF."

Notwithstanding that instruction, on Wednesday afternoon, at which point they had already formed their

position, Mr. Trump's lawyers delayed until 7:58 p.m. last night — I should say inexplicably delayed — to actually file that motion, which is the reason why Ms. Carroll has not yet had an opportunity to submit a written response to it. And, in our view, that -- to call that gamesmanship, I think, would be an act of charity.

Our position, respectfully, is that, first, we would appreciate the opportunity, if the Court would allow it, for us to submit a written response to that motion by Friday of next week, although we can certainly submit a written response earlier, if your Honor would allow it and if that would be the Court's preference, and, more fundamentally, what I would emphasize is that our position is that a complete stay of proceedings in this Court pending appeal is not warranted. We think that, at the very least, it would be appropriate to continue with document discovery, given that document discovery proceedings already began in state court, where the proceedings were against Mr. Trump, and where he was represented by the same counsel, and where those very counsel have already served document requests on Ms. Carroll. It seems hard for us to understand how any immunity or argument that they might raise would be consistent with the fact that they have already undertaken a document discovery process at a time where they knew, or darn well should have known, that these arguments were available to them. And it's our position that under the Second

Circuit's decision in the World Trade Center disaster site litigation case, as well as subsequent authority, this Court would have jurisdiction, and it would be appropriate, under the applicable stay standards, to deny the request for a stay, at least with respect to document discovery, during the pendency of the Second Circuit appeal.

THE COURT: When you say "document," are you speaking generically, everything but depositions, or are you speaking literally of documents and documents only?

MR. MATZ: Your Honor, I'm speaking of documents and documents only. So, for example, that would not include our request for a DNA sample, it would not include, as your Honor points out, depositions or expert discovery. We really do have in mind documents, which discovery process already began below.

THE COURT: Okay.

Who wants to respond on behalf of the President?

MR. BURGO: Good morning, your Honor. Good morning, Robbie. Good morning, Joshua. This is Paul Burgo and Christine Montenegro, from Kasowitz Benson Torres & Friedman, for President Trump.

First of all, I do apologize, we were under the mistaken impression that following the notices of appeal, that the Court would not want to proceed with the discovery conference based on what we thought was a pretty clear point of law that the notice of appeal is a jurisdictional event that

essentially transfers jurisdiction from the district court to the Court of Appeals over all aspects involved in the appeal.

We learned that we were mistaken on that point. We informed, from Mr. Mohan's email, about the conference, then we informed plaintiff's counsel that we would be filing a motion shortly. In response to Mr. Mohan, we put forth all of our authorities, and, of course, we're not opposed to the plaintiff submitting whatever they need to submit, although we don't think it's really necessary.

And then we learned that the Court wanted us to file a motion. We did that. I think it's a pretty clear rule here, the Supreme Court held in *Osborn v. Haley* that when a court denies a certification or a substitution under the Westfall Act, that person is entitled to an immediate appeal because the Westfall Act is designed to immunize covered employees, not simply from liability, but from suit. Courts repeatedly hold that that is a -- that notice of appeal following that is a matter of jurisdictional significance that divests the Court of jurisdiction.

THE COURT: Mr. Burgo, immunity from liability and immunity from discovery are two different things, aren't they?

MR. BURGO: Well, I think the Supreme Court has repeatedly held, and courts from this district have also recognized, that liability from suit includes, and, for example, *Mitchell v. Forsyth*, from the Supreme Court, held that

the immunity constitutes an entitlement not in the same trial or face the other burdens of litigation. *Harlow v. Fitzgerald*, another Supreme Court case --

THE COURT: I suppose your position would be that if a motorist injured in an accident with a post office truck brought a negligence action against the driver of the truck, and the Attorney General moved to substitute the United States on the ground that the post office truck driver was a government employee acting within the scope of his employment, that would terminate any discovery from the post office driver, right?

MR. BURGO: I believe that the discovery could proceed. However, once the notice of appeal is filed, then the district court no longer has the authority to order that discovery because the issues involved is an immunity for that post office driver. In other words --

THE COURT: It's an immunity from liability.

MR. BURGO: Your Honor, I think, respectfully, the Court in *Osborn* -- the Supreme Court in *Osborn v. Haley* said it's not simply from liability, but from suit. I think there really aren't many exceptions that can be pointed to. I think -- I expected plaintiff's counsel to reference the World Trade Center case, because I think that is a very limited exception, but it's not really applicable here. First of all, it's not a Westfall Act case. Second of all, the Court of

Appeals actually did initially stay proceedings, I think the district court refused to do that, but then the Second Circuit ruled that because there was arguably an argument of immunity, that even that arguable case of immunity would divest the Court of jurisdiction.

Later, there was a motion in the Second Circuit, and the Second Circuit was asked to either restore jurisdiction to the district court or to vacate the stay. And it didn't really address, at that stage, what it was doing, whether it was vacating the stay or restoring the jurisdiction, which is something only the Second Circuit could do, but it did end up allowing discovery to proceed because it found that absent the extraordinary circumstances of that case, in other words, there could be hundreds, if not thousands, of people who had died before -- who had been World Trade Center victims who had died before there was a resolution that had allowed discovery to continue, the court later found that, in fact, in that case, unlike here, it was simply a case of immunity from liability and not suit. And, therefore, in fact, the notice of appeal did not divest the district court of jurisdiction, and discovery could proceed because it was not liability from -- excuse me, it was not an immunity from suit.

Here, the Supreme Court has been very clear, on numerous occasions, not just in *Osborn v. Haley*, but in *Gutiérrez*, the Second Circuit has recognized that in *Gold v.*

United States and *Bello v. United States*, that it's immunity from suit, not just liability.

THE COURT: Okay. Mr. Matz. Or I guess I should ask if counsel for the Justice Department wants to be heard.

Is there counsel for the Justice Department on this call?

MR. BURGO: Your Honor, I'm not sure that they are on the call.

MR. MATZ: Your Honor, it's my understanding that they're not on the call, or at least I haven't seen any communication from them or to them indicating that they would be, since they are no longer a party to the proceedings.

THE COURT: Interesting.

Okay. Mr. Matz, anything in response?

MR. MATZ: Yes, your Honor, very quickly.

So the first point is that we appreciate Mr. Burgo's agreement that it would be appropriate for us to submit a brief opposing their motion for a stay, which we think is the fair thing to do, given their tardiness in filing their motion.

I guess the second point I'd make is, it's interesting that they knew about the World Trade Center case, but declined to brief it to the Court or identify it in their motion. In that opinion, the court expressly said that it wasn't deciding, and wasn't relying upon, the jurisdictional and immunity determinations that Mr. Burgo just identified in an effort to

distinguish the case, and, instead, the World Trade Center court pretty clearly indicated that it was not making, ultimately, a decision, as Mr. Burgo put it, about restoring jurisdiction to the district court to proceed, but was, rather, just applying the ordinary state factors rather than some kind of formalistic tests to determine whether or not it was appropriate for district court proceedings to continue during the pendency of that interlocutory appeal.

And, ultimately, we think that that's exactly what ought to happen here, that, rather than apply some kind of formalistic jurisdictional analysis, it makes a lot more sense to think of -- to address the question of a stay of discovery, and particularly of document discovery, which has already begun and in which Mr. Trump's counsel have already participated. We think it makes a lot more sense to think of that through the lens of the ordinary stay factors. And as we'll explain in our briefs, viewed through that lens, we think that all four of the factors cut quite strongly in favor at least denying a stay as to document discovery while the appeal proceeds, and then revisiting that question down the line at an appropriate point, if one arises, before the Second Circuit reaches a disposition of the appeal.

THE COURT: Is there any issue of whether there's been a waiver?

MR. MATZ: Your Honor, a waiver of their right to seek

a stay in light of the fact that they have already undertaken document and other discovery proceedings in the state court against Ms. Carroll?

THE COURT: Not to mention of any right to appeal.

MR. MATZ: Well, you know, it's sort of peculiar, your Honor — and this is something that we are looking into — Mr. Trump and his private counsel did not involve themselves in the proceedings surrounding the Justice Department's motion to substitute. And, of course, in those proceedings, the Justice Department itself waived significant parts of their argument rather than allow Ms. Carroll an opportunity to be heard. And so we do believe that there are, at least potentially, significant waiver issues arising out of that procedural course of conduct, in addition to whatever waiver might be thought to result from the fact that even after they had unsuccessfully attempted to assert an immunity defense in the state court, rather than take an immediate appeal of that in the state courts, Mr. Trump and his attorneys on the call here actively engaged in discovery and served intrusive discovery requests on our client. And so for them to come to the Court now, and throw up their hands and say, your Honor, it'd be crazy to allow anything to happen while the appeal proceeds seems to us rather improbable.

MR. BURGO: Your Honor, if I could just briefly respond to that? This is Paul Burgo.

I think in federal court, it's pretty generally accepted that following a notice of removal, no discovery is allowed prior to the 26(f) conference. The Rule 26(b) states that, and courts recognize that no discovery can continue until the 26(f) conference. So, I think discovery in the state court, to the limited extent that it occurred, is more or less irrelevant here and certainly cannot constitute waiver.

There also can't be a waiver of the right to appeal under these circumstances. That right to appeal is more or less sacred, it was filed within the requisite time frame, and it was proper. And I think the fact that both the President individually and the Department of Justice filed notices of appeal establishes that all parties thought it was proper. My understanding is that they are not here today because of your Honor's order, which made very clear that the Court would like individual counsel to appear before the district court following your Honor's ruling, and we're all respecting that order, of course, and proceeding accordingly.

To briefly respond about that World Trade Center point, to defend ourselves, we didn't cite it because it's simply not relevant here. It's not a Westfall Act case. The Second Circuit did, in fact, grant a stay. The grounds for that stay is that there was an arguable basis for immunity --

THE COURT: I think you're repeating yourself now.

MR. BURGO: Yes, fair enough. But I just wanted to

make clear that we didn't cite that case to the Court because it simply isn't relevant, and there certainly was no trying to hide any ball here. There are many, many cases that we could have cited that we also didn't cite, but that also support our case.

THE COURT: Okay.

Mr. Matz, when do you want to submit your papers?

MR. MATZ: Your Honor, we respectfully suggest next Thursday.

THE COURT: Okay. That's December 17th? Is that what it is?

MR. MATZ: That is proof that I should have my calendar open when I propose a date.

Yes, it is the 17th, your Honor.

THE COURT: Okay.

And, Mr. Burgo, do you want an opportunity to reply?

MR. BURGO: Yes, we would appreciate that, your Honor.

THE COURT: Let's have that by December 21st.

Now, Mr. Burgo, when do you propose to file your brief in the Second Circuit?

MR. BURGO: We have a few days to set the deadline for our briefing yet, and so we're still conferring, but we expect to do so expeditiously.

THE COURT: Define "expeditiously."

MR. BURGO: Well, this is the point where we need to

discuss further with the Department of Justice, as we would like to coordinate and file it on the same date, but --

THE COURT: I think it's very much in your interests for that to happen soon.

MR. BURGO: Yes, your Honor.

THE COURT: Very soon.

Okay. Anything else?

MR. MATZ: Nothing from the plaintiff, your Honor.

THE COURT: Fine.

MR. BURGO: No. Thank you for your time.

THE COURT: Thank you.

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